

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>M &amp; A ENTERPRISES, INC.</b>	:	DETERMINATION
		DTA NO. 820227
for Revision of a Determination or for Refund of Sales and :		
Use Taxes under Articles 28 and 29 of the Tax Law for		
the Period September 1, 1996 through February 28, 2001. :		

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Petitioner, M & A Enterprises, Inc., c/o Amin S. Amin, 560 Main Street, Suite 5A, Islip, New York 11751, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1996 through February 28, 2001.

The Division of Taxation, by its representative, Christopher C. O'Brien, Esq. (John E. Matthews, Esq., of counsel), brought a motion dated March 28, 2005 seeking summary determination in the above-referenced matter pursuant to sections 3000.5, 3000.9(a)(1) and 3000.9(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner did not file a response to the Division of Taxation's motion. Accordingly, the 90-day period for the issuance of this determination began on April 27, 2005, the due date for petitioner's response. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Timothy J. Alston, Administrative Law Judge, renders the following determination.

***ISSUE***

Whether petitioner filed a timely Request for Conciliation Conference with the Bureau of Conciliation and Mediation Services following the issuance of a Notice of Determination.

***FINDINGS OF FACT***

1. The subject of the motion of the Division of Taxation (“Division”) is the timeliness of petitioner’s protest of a Notice of Determination dated October 28, 2002 and addressed to petitioner, M & A Enterprise, Inc.,<sup>1</sup> at 560 Main Street, Suite 4, Islip, New York 11751.

2. The subject Notice of Determination asserts \$87,920.24 in additional sales and use taxes due, plus penalty and interest, for the period September 1, 1996 through February 28, 2001. The notice bears assessment identification number L-021691193-2 and the corresponding “Mailing Cover Sheet” bears petitioner’s name and address as listed above and certified mail control number 7104 1002 9739 0131 6510.

3. On October 1, 2004, petitioner filed a Request for Conciliation Conference with the Division’s Bureau of Conciliation and Mediation Services (“BCMS”) in protest of the subject Notice of Determination.

4. On October 22, 2004, BCMS issued a Conciliation Order Dismissing Request to petitioner. The order determined that petitioner’s protest of the subject Notice of Determination was untimely and stated, in part:

The Tax Law requires that a request be filed within 90 days from the date of the statutory notice. Since the notice was issued on October 28, 2002, but the request was not mailed until October 1, 2004, or in excess of 90 days, the request is late filed.

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<sup>1</sup> The slight variation in petitioner’s name as listed on the petition (“M & A Enterprises, Inc.”) and on the subject Notice of Determination (“M & A Enterprise, Inc.”) is deemed inconsequential.

5. Notices of determination, such as the one at issue, are computer-generated by the Division's Computerized Case and Resource Tracking System ("CARTS") Control Unit. The computer preparation of such notices also includes the preparation of a certified mail record ("CMR"). The CMR lists those taxpayers to whom notices of determination are being mailed and also includes, for each such notice, a separate certified control number.

6. Each computer-generated notice of determination is pre-dated with its anticipated mailing date and each is assigned a certified mail control number. This number is recorded on the CMR under the heading "Certified No." The certified number for each notice also appears on a separate one-page "Mailing Cover Sheet" that is generated by CARTS for each notice of determination. The CMR lists a "run" date (the date and time of its printing) in its upper left corner which is generally about 10 days earlier than the anticipated mailing date for the notices. This period is provided to allow sufficient time for manual review and processing of the notices, including affixation of postage, and mailing. The run (printing) date on the CMR is manually changed at the time of mailing by Division personnel to conform to the actual date of mailing of the notices. In this case, the CMR lists a run date of "20022891700" (meaning "September 28, 2002 5:00 PM"), which has been manually changed to October 28, 2002.

7. After notices of determination, along with accompanying mail cover sheets and appropriate enclosures, are placed in window envelopes by Division personnel, the envelopes are then placed in an area designated by the Division's Mail Processing Center for "Outgoing Certified Mail." A staffer weighs and seals each envelope and affixes postage and fee amounts thereon. A Mail Processing Center clerk then checks the first and last pieces of certified mail listed on the CMR against the information contained on the CMR. The clerk also performs a random review of 30 or fewer pieces of mail against the information contained on the CMR.

Thereafter, a Mail Processing Center employee delivers the stamped envelopes and associated CMR to the Colonie Center branch of the U.S. Postal Service in Albany, New York, where a postal employee accepts the envelopes into the custody of the Postal Service and affixes a dated postmark or his initials (or signature) or both to the CMR.

8. In the ordinary course of business, a Mail Processing Center employee picks up the CMR from the post office on the following day and returns it to the originating office (CARTS Control) within the Division.

9. The CMR relevant to this case is a 29-page, computer-generated document entitled “Assessments Receivable Certified Record for Non-Presort Mail.” This CMR lists 318 certified control numbers, each of which is assigned to an item of mail listed thereon. That is, corresponding to each listed certified control number is a notice number (under the heading “Reference No.”), the name and address of the addressee, and postage and fee amounts. There are no deletions from the list.

10. Information regarding the subject Notice of Determination is contained on page 23 of the CMR. Specifically, corresponding to the certified control number 7104 1002 9739 0131 6510 is reference (notice) number L021691193 (*see*, Finding of Fact “2”), along with petitioner’s name and an address, which is identical to that listed on the subject Notice of Determination and on the related Mail Cover Sheet.

11. Page 23 of the CMR also contains information regarding a Notice of Determination issued to petitioner’s representative. Specifically, corresponding to certified control number 7104 1002 9739 0131 6527 is reference (notice) number L021691193 along with the name and address of petitioner’s representative as follows: “William S. Dempsey, 220 North Wellwood Ave., Lindenhurst, NY 11757.”

12. Each page of the CMR bears the postmark of the Colonie Center Branch of the U.S. Postal Service dated October 28, 2002 and the initials of a Postal Service employee.

13. At the bottom of the CMR there is a preprinted entry of 318 corresponding to the heading "Total Pieces and Amounts Listed." This figure has been manually circled.

14. The affixation of the Postal Service postmarks, the initials of the Postal Service employee, and the circling of the "total pieces listed" figure indicate that all 318 pieces of mail listed on the CMR were received at the post office.

15. The facts set forth above in Findings of Fact "5" through "14" were established through affidavits of Geraldine Mahon and Bruce Peltier. Ms. Mahon is employed as the Principal Clerk in the Division's CARTS Control Unit. Ms. Mahon's duties include supervising the processing of notices of determination. Mr. Peltier is employed as a Mail and Supply Supervisor in the Division's Registry Unit. Mr. Peltier's duties include supervising Mail Processing Center staff in delivering outgoing mail to branch offices of the U.S. Postal Service.

16. The fact that the Postal Service employee circled the total number of pieces listed on the CMR to indicate that this was the number of pieces received was established through the affidavit of Mr. Peltier. Mr. Peltier's knowledge of this fact is based on his knowledge that the Division's Mail Processing Center requested that Postal Service employees either circle the number of pieces received or indicate the total number of pieces received by writing the number of such pieces on the CMR.

17. The Division generally does not request, demand or retain return receipts from certified or registered mail.

18. Prior to the audit that resulted in the subject Notice of Determination, petitioner did not file any sales tax returns. A Division investigation during the audit indicated that petitioner's address was 560 Main St., Suite 4B, Islip, New York.

19. As part of its motion papers, the Division submitted a copy of petitioner's request for conciliation conference filed on October 1, 2004. Such request states as the basis for petitioner's claim, in part, as follows:

An audit was performed in 2002, we protested the results of the audit, see attached letter.<sup>2</sup> Then we did not receive any other correspondence from the Audit Division. In the meantime, we filed the actual returns in order to qualify for amnesty. The tax, penalty and interest for these filed returns were paid. The only correspondence that we received is an assessment notice and collection notices. During this time we sent numerous letters protesting the assessment without receiving a response.

### ***CONCLUSIONS OF LAW***

A. A motion for summary determination may be granted:

if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party (20 NYCRR 3000.9[b][1]).

B. Section 3000.9(c) of the Rules of Practice and Procedure of the Tax Appeals Tribunal provides that a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212. "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316, 317, *citing Zuckerman v. City of New York*, 49 NY2d 557, 427 NYS2d 595). Inasmuch as summary judgment is the procedural

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<sup>2</sup> No such letter was attached to the copy of the request for conciliation conference submitted with the Division's motion papers.

equivalent of a trial, it should be denied if there is any doubt as to the existence of a triable issue or where the material issue of fact is “arguable” (*Glick & Dolleck v. Tri-Pac Export Corp.*, 22 NY2d 439, 293 NYS2d 93; *Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 AD2d 572, 536 NYS2d 177). If material facts are in dispute, or if contrary inferences may be drawn reasonably from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (*Gerard v. Inglese*, 11 AD2d 381, 206 NYS2d 879).

“To defeat a motion for summary judgment the opponent must produce ‘evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim,’ and ‘mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient’” (*Whelan By Whelan v. GTE Sylvania*, 182 AD2d 446, 582 NYS2d 170, 173 *citing Zuckerman v. City of New York, supra*).

C. In the instant matter, petitioner did not respond to the Division’s motion; it is therefore deemed to have conceded that no question of fact requiring a hearing exists (*see, Kuehne & Nagel v. Baiden*, 36 NY2d 539, 544, 369 NYS2d 667, 671; *Costello v. Standard Metals*, 99 AD2d 227, 472 NYS2d 325). Moreover, petitioner presented no evidence to contest the facts alleged in the Mahon and Peltier affidavits; consequently, those facts may be deemed admitted (*see, Kuehne & Nagel v. Baiden, supra*, at 544, 369 NYS2d at 671; *Whelan By Whelan v. GTE Sylvania*, 182 AD2d 446, 582 NYS2d 170, 173).

D. Tax Law § 1138(a)(1) authorizes the Division of Taxation to issue a Notice of Determination for additional tax or penalties due under Articles 28 and 29. A taxpayer may file a petition with the Division of Tax Appeals seeking revision of such determination, or alternatively, a request for conciliation conference with BCMS, *within 90 days of the mailing of the notice of determination* (*see*, Tax Law § 1138[a][1]; § 170[3-a][a]). The Division of Tax

Appeals lacks jurisdiction to consider the merits of any protest filed beyond this 90-day time limit (*see, Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

E. Where, as here, the Division claims a taxpayer's protest against a notice was not timely filed, the initial inquiry must focus on the issuance of the notice. Where a notice is found to have been properly mailed, "a presumption arises that the notice was delivered or offered for delivery to the taxpayer in the normal course of the mail" (*see, Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). However, the "presumption of delivery" does not arise unless or until sufficient evidence of mailing has been produced and the burden of demonstrating proper mailing rests with the Division (*id.*). The Division may meet this burden by evidence of its standard mailing procedure, corroborated by direct testimony or documentary evidence of mailing (*see, Matter of Accardo*, Tax Appeals Tribunal, August 12, 1993).

F. The mailing evidence required is two-fold: First, there must be proof of a standard procedure used by the Division for the issuance of statutory notices by one with knowledge of the relevant procedures; and second, there must be proof that the standard procedure was followed in this particular instance (*see, Matter of Katz, supra; Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991).

G. In this case, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Mahon and Mr. Peltier, Division employees involved in and possessing knowledge of the process of generating and issuing (mailing) notices of determination (*see*, Finding of Fact "15").

H. The CMR provides sufficient documentary proof to establish that the Notice of Determination dated October 28, 2002 was mailed as addressed on October 28, 2002. This 29-page document lists 318 certified control numbers with corresponding names and addresses.



There are no deletions from this list. Each page of the CMR bears a U.S. Postal Service postmark dated October 28, 2002 and the initials of a Postal Service employee. Additionally, a postal employee circled the entry “318” next to the “total pieces listed” heading. The CMR thus indicates on its face that the post office received all of the pieces of mail listed thereon. Accordingly, the Division has established that it mailed the subject Notice of Determination as claimed on October 28, 2002.

I. Tax Law § 1138(a)(1) further requires the Division to mail the subject notice to the taxpayer’s “last known address.” Here, a Division investigation during the audit revealed that petitioner’s address was 560 Main Street, Suite 4B, Islip, New York. Although there is a small discrepancy between this address and the address on the subject notice of determination,<sup>3</sup> given the absence of any evidence to show that petitioner did not actually receive the subject notice and considering the apparent acknowledgment of receipt of such notice in petitioner’s request for conference (*see*, Finding of Fact “19”), it is concluded that such difference is inconsequential (*see, Matter of Combemale*, Tax Appeals Tribunal, March 31, 1994).

J. The Division has thus established that it properly mailed the subject Notice of Determination to petitioner on October 28, 2002 as claimed.

K. Petitioner’s request for conciliation conference claims that petitioner protested the audit and references an attached letter. No such letter was submitted with the Division’s motion papers and, as has been noted, petitioner declined the opportunity to submit any evidence in opposition to the Division’s motion. At best, then, the claim of a protest in the request

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<sup>3</sup> Specifically, the investigation revealed that petitioner’s address was 560 Main Street, Suite 4B, Islip, New York, while the Notice of Determination was addressed to petitioner at 560 Main Street, Suite 4, Islip, New York.

constitutes an unsubstantiated allegation and as such is insufficient to defeat the Division's motion (*see, Zuckerman v. City of New York, supra*).

L. As noted herein, petitioner's request for a conciliation conference was filed on October 1, 2004. This date falls well beyond the 90-day period of limitations for the filing of such a request. Petitioner's request was therefore untimely filed (*see*, Tax Law § 1138[a][1]; § 170[3-a][a]).

I. The Division of Taxation's motion for summary determination is granted, and the petition of M & A Enterprises, Inc. is dismissed with prejudice.

DATED: Troy, New York  
May 19, 2005

/s/ Timothy J. Alston  
ADMINISTRATIVE LAW JUDGE